

(iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>7</sup> and Rule 19b-4(f)(6) thereunder.<sup>8</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>9</sup> However, Rule 19b-4(f)(6)(iii)<sup>10</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. ISE has requested that the Commission waive the 30-day operative delay. ISE states that under the proposal, all-or-none orders will be exposed to all members so that there is a greater opportunity for market participants to interact with such orders. The Commission also notes that the proposal is on a three-month pilot basis. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, and designates the proposed rule change to be operative upon filing with the Commission.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>12</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule

change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2009-51 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2009-51. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2009-51 and should be submitted on or before August 12, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60306; File No. SR-FINRA-2009-035]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Adopt Its Temporary and Permanent Cease and Desist Authority on a Permanent Basis

July 14, 2009.

On May 18, 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a the National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt its rules regarding the issuance of issue temporary and permanent cease and desist orders on a permanent basis. The proposal was published for comment in the **Federal Register** on June 9, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

Since May 2003, pursuant to a pilot program approved by the Commission<sup>4</sup> and subsequent extensions,<sup>5</sup> FINRA has had the authority to issue temporary cease and desist orders ("TCDOs");<sup>6</sup> impose permanent cease and desist orders as a remedy in disciplinary cases; and enforce cease and desist orders. FINRA proposed to make the existing pilot program permanent.<sup>7</sup>

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 60028 (June 2, 2009), 74 FR 27364 (June 9, 2009) ("Notice").

<sup>4</sup> See Securities Exchange Act Release No. 47925 (May 23, 2003), 68 FR 33548 (June 4, 2003) (Order Approving File No. SR-NASD-98-80).

<sup>5</sup> The extensions were filed for immediate effectiveness and were therefore not approved by the Commission. See Securities Exchange Act Release No. 51860 (June 16, 2005), 70 FR 36427 (June 23, 2005) (SR-NASD-2005-061); Securities Exchange Act Release No. 55819 (May 25, 2007), 72 FR 30895 (June 4, 2007) (SR-NASD-2007-033); and Securities Exchange Act Release No. 60035 (June 3, 2009), 74 FR 27360 (June 9, 2009) (SR-FINRA-2009-034).

<sup>6</sup> A TCDO is a preliminary order issued in connection with an underlying disciplinary proceeding that has been initiated or will be initiated immediately.

<sup>7</sup> The rule filing does not make any substantive changes to the existing pilot program.

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>9</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission deems this requirement to be met.

<sup>10</sup> *Id.*

<sup>11</sup> For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>12</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on July 13, 2009, the date on which ISE submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

a national securities association.<sup>8</sup> In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,<sup>9</sup> which requires, among other things that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also believes that the proposed rule change is consistent with the provisions of Section 15A(b)(7) of the Act,<sup>10</sup> which provides that FINRA members, or persons associated with its members, must be appropriately disciplined for violations of any provisions of the Act or FINRA's rules.

The Commission believes that making the pilot program permanent will provide FINRA with a mechanism to take action in certain situations against a member or an associated person that is alleged to have engaged, or is engaging, in conduct that violates Commission, FINRA, or NASD rules, when such intervention is necessary in order to prevent likely significant dissipation or conversion of assets or other significant harm to investors before the underlying disciplinary proceeding can be completed. At the same time, the Commission believes that FINRA's cease and desist provisions contain sufficient procedural protections to ensure that respondents have the opportunity for a fair hearing and, if applicable, review thereof. When it first sought cease and desist authority in 2003, FINRA said that it would use the authority sparingly and has, in fact, only used its authority once for a TCDO and once for a permanent cease and desist order.<sup>11</sup> FINRA stated in its Notice that if the proposal were adopted on a permanent basis, it would continue to use its cease and desist authority judiciously. The Commission expects that FINRA will continue to use this authority in an appropriate manner. The Commission believes it is reasonable and consistent with the Act for FINRA to adopt the cease and desist rules permanently to enable it to stop persons from engaging in securities transactions or conduct affecting the marketplace, in alleged violation of established rules, which is likely to cause harm to

investors or would adversely affect the public interest if not addressed expeditiously.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-FINRA-2009-035), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60313; File No. SR-BATS-2009-023]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

July 15, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 9, 2009, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. BATS has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify BATS Rule 15.1, entitled "Authority to Prescribe Dues, Fees, Assessments and Other Charges," effective immediately.

The text of the proposed rule change is available at the Exchange's Web site at <http://www.batstrading.com>, at the principal office of the Exchange, and at

the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to modify BATS Rule 15.1 to adopt new paragraph (d), which will allow the Exchange to pass on certain, specific fees that it is charged by the company that operates the data center where the Exchange's System<sup>5</sup> is located, as described in further detail below.

Exchange Members wishing to co-locate their trading hardware to the Exchange's System can do so by leasing space directly from the company that owns the data center. The Exchange has no involvement in determining the terms of any fees paid by the Member to lease co-location space and does not receive any proceeds from such fee. Certain Members of the Exchange maintain a co-location relationship with another Trading Center's<sup>6</sup> system that is located in the same data center as the Exchange. To co-locate to the Exchange, rather than leasing additional space near the Exchange's System, some Members choose instead to simply cross-connect their existing trading hardware from the space near another Trading Center's system to the Exchange's System. In such cases, the company that owns the data center charges the Exchange a monthly cross-connection fee. Pursuant to the proposed rule the Exchange will pass this cross connection fee on, in full, to the applicable Member.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the

<sup>8</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

<sup>10</sup> 15 U.S.C. 78o-3(b)(7).

<sup>11</sup> See Notice for a more detailed description of the matter.

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> The term "System" is defined in BATS Rule 1.5(aa).

<sup>6</sup> The term "Trading Center" is defined in BATS Rule 2.11.